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Biotechnology

President Signs Law for 2004/2005 Biotech-Soybean Crop

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Report Highlights:

The President of Brazil signed on January 12, 2005, Law Number 11,092 establishing the rules for the planting and marketing of the 2004/2005-biotech soybean crop. This report provides a preliminary analysis and a full translation of this Law, and provides an additional update on biotech issues in Brazil.

Includes PSD Changes: No
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Summary

The President of Brazil signed on January 12, 2005, Law Number 11,092 establishing the rules for the planting and marketing of the 2004/2005-biotech soybean crop. This law entered into force on January 13, 2005, after its publication in Brazil's Diario Oficial (the equivalent of the Federal Register). This report also provides a brief update of other biotech related issues.

New Regulation for the 2004/05 Biotech Soybean Crop

On October 14, 2004, President Lula signed and sent to Congress Provisional Measure (MP) Number 223 (see GAIN 4626) to allow the planting of the 2004/2005 soybean crop. President Lula held until the last minute the release of another MP (the third one during his administration) because he was expecting Congress to enact the proposed Biosafety Bill and resolve the situation regarding the use of biotechnology in agriculture in Brazil.

Note: Provisional Measure (MP) is an act by the President, under the powers and privileges granted to him by the Brazilian Constitution. It has the force of a law, until Congress reviews and gives final approval, and then, once signed by the President becomes a full law.

MP 223 was approved by Congress on December 21, 2004, and signed into a full law by President Lula on January 12, 2005. Although President Lula had the authority to veto parts of the MP approved by the Congress, he accepted the full text received from the Congress. There are two important alterations introduced by the House (and approved by the Senate) regarding MP 223 and accepted by the President:

First, the extension for 180 days (from 60 days previously) for the deadline regarding the marketing of the 2004/2005 soybean crop. The 180-day extension begins on January 31, 2006.

Second, the change introduced by the House related to the collection of royalties. The text introduced by the House (Article 7 of Law 11,092/05) requires that the company holding the patent rights can collect royalties only after showing sale invoices. This is a major change from a previous agreement Monsanto had with soybean producers in the South of Brazil, under which collection of royalties were based on production, including biotech seeds sold illegally.

This change to require sales invoices was introduced by the House during the discussion of MP 223 and was due to the pressure from soybean producers, mostly from the South of Brazil. According to these producers, Monsanto agreed to charge R\$0.60 per soybean bag of 60 kilos during the last crop year (2003/04), but was planning to double the value for R\$1.20 during the 2004/05 crop year. Legal experts in Brazil claim that Article 7 of Law 11,092/05 is unconstitutional and it can be challenged in Brazil's higher court. They also say that Article 7 violates the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). According to some of these experts, it does make sense technically to request the invoice for the sale of a product to permit the payment of a royalty. In fact, the royalties are paid by the licensee to the patentee in order for the production to occur.

Other Biotech Issues

1) Another related issue regarding collection of royalties is the new injunction issued on January 12, 2005 by the State Justice Court in Rio Grande do Sul against Monsanto and in favor of the producers affiliated with the Cooperative of Campo Novo in that state.

The injunction states that producers cannot be compelled to pay royalties. According to the judge that signed the injunction, the intellectual property right cannot be extended to all soybean production. He cited in his arguments that the Cooperative is protected under the Law of Cultivar Protection (Law 9,456/97). Since this is not a final court ruling and Monsanto can appeal this decision, the Cooperative will have to deposit, in court, the royalties until a final decision is taken by a superior court.

2) The Biosafety Bill approved by the Senate is now in Brazil's House of Representative pending approval. The Senate changed the House version last year and the Bill is considered more biotech-friendly, and reestablishes the power of the National Technical Commission of Biosafety (CTNBio). Legislative experts foresee that the Congress will pass the Biosafety Bill by April 2005.

3) Brazil renews certification of safety of its soybeans to China. On January 13, 2005, the Ministry of Agriculture, Livestock, and Food Supply (MAPA) forwarded the official certification to the Chinese government stating that its soybeans do not offer health, animal or environmental risks. The official certification is based on the CTNBio technical statement and reinforced with the text of Law 11,092/05 signed by President Lula on January 12, 2005. The previous MAPA certification expired on December 31, 2004.

4) Biotech Cotton. The National Technical Commission of Biosafety (CTNBio) published on January 13, 2005, Conclusive Rule Number 480/2004, establishing, the limit of one percent for biotech cotton. The decision was in response to a request made to the institution by the Brazilian Association of Seed Producers (ABRASEM). In its decision CTNBio acknowledges the existence of "illegal" biotech cottonseeds in Brazil and that a significant share of legal cottonseeds show traces of genetically modified organisms. In view of this, CTNBio decided to establish a one percent limit. According to the institution, this does not mean that CTNBio approved biotech cotton in Brazil.

5) No changes in biotech labeling (See GAIN BR3614). As per Article Two of Executive Order Number 4,680/03 Brazil established the limit of one percent for food and food ingredients destined for human or animal consumption containing or being produced with genetically modified organisms, and stated that consumers needed to be informed of the transgenic nature of the product.

Attachment 1: Law Number 11,092 of January 12, 2005

Establishes the rules for the planting and marketing of the 2004/2005-biotech soybean crop, alters Law Number 10, 814, of December 15, 2003, and provides other measures.

THE PRESIDENT OF THE REPUBLIC,

Make known that the National Congress has decreed and I sanction the following Law:

Article One. The seeds of the 2003/2004 biotech soybean crop, set aside by producers for their own use, pursuant to the terms of Article Two, Sub-article XLIII, of Law Number 10,711, of August 5, 2003, which are to be planted until December 31, 2004, are not subject to the provisions of the following sub-articles:

I – of sub-articles one and two of Article 8, and the main provision of article 10 of Law Number 6,938, of August 31, 1981, regarding the genetically modified species foreseen under code 20 of its Annex VIII;

II – of Law Number 8,974, of January 5, 1995, as amended by Provisional Measure Number 2,191-9, of August 23, 2001; and;

III – of Article 5, of Law Number 10,814, of December 15, 2003, regarding planting prohibitions.

Sole paragraph – The marketing of the 2003/2004-biotech soybean crop as seed and use as seed in farms outside of the state where it was produced is prohibited.

Article Two. The provisions of Law Number 10,688, of June 13, 2003, apply to the soybean harvest from the seeds referred in article one of this Law, and the marketing of this crop is permitted until January 31, 2006, inclusive.

Paragraph One - The deadline for marketing established in this article may be extended 180 (one hundred and eighty) days by means of an act of the government.

Paragraph Two - The remaining soybean stock after the date established by this article, with cleaning of the warehouse spaces complete prior to the 2005/2006-soybean harvest.

Article Three. Those producers under the provisions of article one of this Law, except for the provisions under articles 3 and 4 of Law Number 10,688 of 2003, may only plant and market the 2004/2005 soybean crop if they sign the declaration of Commitment, Responsibility, and Agreement of Conduct, as per this regulation, observing the legal and regulatory rules in force.

Paragraph One. The Declaration of Commitment, Responsibility, and Agreement of Conduct, which is of exclusive use of producers and federal agencies and entities, must be signed by January 31, 2005, and delivered to the agencies of the Brazilian Post Office Service, the branches of the Caixa Econômica Federal and Banco do Brasil, in the state offices of the Ministry of Agriculture, Livestock, and Food Supply (MAPA), or other places authorized by MAPA.

Paragraph Two. Those producers under the provisions of Article One of Law 10,814, of December 15, 2003 and that did not sign the Declaration of Commitment, Responsibility, and Agreement of Conduct for the planting and marketing of the 2004/2005 soybean crop can use the seeds set aside for the planting of the 2005 crop, if they meet the provisions of this article and its paragraph first.

Article Four. The biotech soybean producer who does not sign the Declaration of Commitment, Responsibility, and Agreement of Conduct as foreseen in article three will be prohibited from obtaining loans and financing from official credit institutions, under National Rural Credit System - SNCR, will not have access to fiscal or credit incentives, and will not be admitted to participate in programs including credit negotiations or parceling of debts regarding taxes and fees established by the federal government.

Paragraph One – For the purpose of obtaining loans or financing from institutions under the National Rural Credit System - SNCR, the non-biotech soybean producer who is not under the provisions of article four of Law Number 10,814 of 2003, or who does not present invoices for the purchases of certified seeds, or who does not present a certification of soybeans to be used as seeds, must sign a simplified declaration of “Conventional Soybean Producer”.

Paragraph Two – For the purpose of this Law, conventional soybeans is defined as that obtained from seeds not genetically modified, as defined by Law Number 8,974, of January 5, 1995.

Article Five. With consideration for the penalties foreseen in the legislation in force, the producers of biotech soybeans who cause damages to the environment and to third parties, including those damages caused by contamination with cross-breeding, he or she, will be held responsible for indemnity or full compensation for the damage, regardless the existence of guilty.

Article Six. It is authorized the provisory registration of biotech soybean varieties, glyphosate-resistant, under the National Registry of Cultivars, pursuant to the terms of Law Number 10,711 of August 5, 2003.

Paragraph One - The Ministry of Agriculture, Livestock and Supply and the Ministry of the Environment will monitor the multiplication of seeds foreseen in this article and will maintain strict control of production and stocks.

Article Seven. In the event of collection of royalties for patent rights to the technology applied to soybeans pursuant article one of this Law, the holder of the patent shall prove the sale of seeds through sale invoices.

Article Eight. The Commission referred in article 15 of Law Number 10,814 of 2003 will monitor and supervise the compliance of the provisions of this Law.

Article Nine. Those producers covered under the provisions of article one of this Law can be fined as per article seven of Law Number 10,688, of June 13, 2003, in those cases of violation of the provisions of this Law and those provisions regarding the Declaration of Commitment, Responsibility, and Agreement of Conduct, as stated in article three of this Law.

Article Ten. Article Six of Law 10,814, of December 15, 2003, is altered and is in force added of the following sole paragraph:

“Article Six.....

Sole Paragraph. It is not included in the category of derived from genetically modified organisms, the pure substance, chemically defined, obtained by means of biological processes and that do not contain genetically modified organisms, heterologus protein or AND recombinant.” (NR)

Article Eleven. Those agricultural enterprises that use seeds referred in article one of Law 10,814, of December 15, 2003, and articles one and six of this Law, can make use of the following insurance programs PROAGRO AND PROAGRO MAIS.

Sole Paragraph. In order to make use of the programs foreseen in this article, producers must sign the Declaration of Commitment, Responsibility, and Agreement of Conduct plus the clause of abdication of the coverage of PROAGRO AND PROAGRO MAIS for eventual losses in the crop due to genetic deformation of the plants and attack of pests and diseases.

Article Twelve. For the purposes of this Law, articles 4, 6, 7, 10 and 11 of Law Number 10,814 of 2003 will apply.

Article Thirteen. The marketing deadlines established by this Law can be extended at the federal government criteria.

Article Fourteen. This Law enters into force on the date of its publication.

Brasília, January 12, 2005; 184th year of the Independence and 117th year of the Republic.

LUIZ INÁCIO LULA DA SILVA

Roberto Rodrigues

Notes:

- (1) This text was published in the Diario Oficial (Brazil's Federal Register) on January 13, 2005.
- (2) Informal translation by the Office of Agricultural Affairs, Brasília, Brazil.